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No. 00-972

In the Supreme Court of the United States

CONTEMPORARY MEDIA, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether a Federal Communications Commission order revoking petitioners' broadcast licenses and permits and denying an application for a new permit, because the Commission determined that petitioners' continued operations would not further the public interest, is "punishment" subject to the Eighth Amendment's prohibition against excessive fines.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 214 F.3d 187. The order of the Federal Communications Commission (Pet. App. 21a-63a) is reported at 13 F.C.C.R. 14,437 and the order denying the petition for reconsideration (Pet. App. 64a-74a) is reported at 14 F.C.C.R. 8790.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2000. A petition for rehearing was denied on September 14, 2000 (Pet. App. 75a-76a). The petition for a writ of certiorari was filed on December 13, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934 requires that the Federal Communications Commission (FCC) determine whether the granting of a license application will further the public interest. 47 U.S.C. 309(a). Even after the FCC awards a license, it is empowered to revoke the license if information comes to the agency's attention which leads to the conclusion that continued operation would not further the public interest. 47 U.S.C. 312(a)(2). In determining whether a license furthers the public interest, the FCC considers, among other things, the character of the license applicant. Pet. App. 28a (citing 47 U.S.C. 308(b), 309(a); *In re Policy Regarding Character Qualifications in Broad. Licensing*, 102 F.C.C. 2d 1179, 1180 (1986)). Thus, the Act requires that all "applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the * * * character * * * of the applicant to operate the station." 47 U.S.C. 308(b). In making these character evaluations, the FCC considers felony convictions not related to FCC conduct because such a conviction may provide "an indication of an applicant's or licensee's propensity to obey the law." *In re Policy Regarding Character Qualifications in Broad. Licensing*, 5 F.C.C.R. 3252, 3252 (1990).

2. Petitioners are corporations that are licensees of five radio stations in Indiana and Missouri, as well as the permittees of two unbuilt radio stations in Missouri, and an applicant for a new radio station in Missouri. Pet. App. 2a. Michael Rice is the sole shareholder of the licensee corporations. *Ibid.* He also is the president

and treasurer of each corporation, and serves on each corporation's board of directors. *Ibid.*

In April 1991, St. Charles County, Missouri prosecutors filed an information charging Rice with three felony counts of sexual assault of an individual between fourteen and sixteen years of age. Pet. App. 2a, 25a. Prosecutors later amended the information and Rice was eventually convicted of four counts of forcible sodomy, six counts of deviate sexual assault in the first degree, and two counts of deviate sexual assault in the second degree. *Id.* at 3a. For these twelve felony convictions, Rice was sentenced to a total of 84 years in prison. *Id.* at 3a-4a. As a result of concurrent sentencing, however, he faced a maximum imprisonment of eight years. *Id.* at 4a.

After prosecutors filed the information against him in April 1991, Rice entered a hospital for psychiatric treatment. Pet. App. 2a. In June 1991, two of the licensees filed reports with the FCC pursuant to 47 C.F.R. 1.65(a), which requires licensees to maintain "the continuing accuracy and completeness of information furnished" to the agency. The filings stated that

> [s]ince Mr. Rice's hospitalization on April 3, 1991, he has had absolutely no managerial, policy, or consultative role in the affairs of the [petitioners]. * * * In other words, pending a resolution of the referenced criminal charges, Mr. Rice is being completely insulated and excluded from any involvement in the managerial, policy, and day-to-day decisions involving any of the * * * stations and * * * construction permits held by the [petitioners].

Id. at 3a.

3. After learning of Rice's conviction and his potential continued involvement in station affairs contrary to petitioners' statements, the Commission issued an order, pursuant to 47 U.S.C. 312(c), directing petitioners to show cause why the licenses and/or construction permits for their existing stations should not be revoked and why the pending application for a new station should not be denied. *In re Contemporary Media, Inc.*, 10 F.C.C.R. 13,685 (1995). The order explained that Rice's convictions and petitioners' potential misrepresentations raised "serious questions as to whether [petitioners] possess the qualifications to be or remain licensees" and thus revocation might be warranted under 47 U.S.C. 312(a)(2), which authorizes revocation when "conditions com[e] to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application."[1] *Id.* at 13,685 & n.5. Following a full evidentiary hearing, the administrative law judge (ALJ) concluded that Rice's felony convictions and petitioners' misrepresentations in their reports to the Commission each constituted a "separate and independent ground" for revocation of the licenses and permits and denial of the pending application. *In re Contemporary Media, Inc.*, 12 F.C.C.R. 14,254, 14,306 (1997).

Petitioners appealed the ALJ's decision, and the Commission affirmed. Pet. App. 21a-63a. The Commission agreed with the ALJ that Rice's felony convictions and petitioners' misrepresentations and lack of

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[1] Section 312(a)(1), which authorizes revocation for "false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title," also provides authority to revoke based on the misrepresentations. 47 U.S.C. 312(a)(1).

candor constituted separate and independent grounds for disqualification of the licenses and permits. *Id.* at 59a. The agency rejected petitioners' argument that the revocations violated the Excessive Fines Clause of the Eighth Amendment, explaining that "the Commission's purpose is not to impose punishment, but it may revoke an authorization where, as here, it finds that the licensee or permittee has not met its statutory obligation to operate its facility in the public interest. *See* 47 U.S.C. §§ 307(a), 309(a)." *Id.* at 61a. Petitioners sought reconsideration, which the Commission denied. *Id.* at 64a-74a.

4. The court of appeals "affirm[ed] the FCC in all respects." Pet. App. 2a. The court first rejected petitioners' argument that the FCC's policy of considering non-FCC-related misconduct in evaluating character is arbitrary and capricious, explaining that there is "nothing irrational in the conclusion that the violation of the criminal laws is relevant to [evaluating propensity to obey the law] and to the issue of character in general." *Id.* at 7a. The court of appeals also rejected petitioners' challenge to the application of the FCC character policy to the facts of this case. *Id.* at 10a-14a. And the court specifically found that substantial evidence supports the FCC's determination that petitioners "misrepresented and lacked candor in reporting to the Commission that, subsequent to his arrest, Rice was completely excluded from any further involvement in the management and operation of [petitioners'] radio stations." *Id.* at 14a-18a.

With respect to the Excessive Fines Clause argument that petitioners ask this Court to review, the court of appeals explained that "[t]he FCC revokes a license not to punish a licensee for its conduct, but because that conduct indicates to the Commission that

the licensee is no longer qualified to hold it." Pet. App. 20a. A licensee is no longer qualified to hold a license "when the Commission concludes that the licensee can no longer be trusted to deal with it honestly, to follow its regulations, and to operate in the public interest." *Ibid.* The court of appeals also noted this Court's ruling that denial of FCC licenses "is not a penal measure." *Id.* at 19a (quoting *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 228 (1946)).

ARGUMENT

The decision of the courts of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the petition challenges only one of the two "separate and independent grounds" (Pet. App. 59a) upon which the FCC disqualified petitioners from holding broadcast licenses. Thus, even if petitioners could show that the FCC's decision to disqualify based on Rice's felony convictions was unlawful, the agency's decision to revoke would stand on an independent ground that is unchallenged in the petition. Further review is not warranted.

1. The FCC decision expressly states that "Rice's felony convictions and the Licensees' misrepresentation and lack of candor with respect to Rice's role at the radio stations subsequent to his arrest *constitute separate and independent grounds* for disqualification of the Licensees." Pet. App. 59a (emphasis added); see also *Contemporary Media*, 12 F.C.C.R. at 14,306 (ALJ reaching same conclusion). In the court of appeals, "the licensees conceded that if [the court] were to sustain the FCC's finding of intentional misrepresentation[,] that alone would be sufficient ground for the revocation of their licenses." Pet. App. 14a. And the court of appeals did sustain the FCC's "separate and inde-

pendent" determination, upholding the agency's finding of misrepresentations, *id.* at 14a-18a, and noting that revocation is an appropriate remedy for this conduct, *id.* at 14a ("[I]t is well recognized that the Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency." (quoting *Schoenbohm* v. *FCC*, 204 F.3d 243, 247 (D.C. Cir.), cert. denied, 121 S. Ct. 405 (2000)). Petitioners point to one word in the FCC decision—"[c]umulatively," *id.* at 61a—to argue that the FCC did not actually mean what it said when it unequivocally stated that Rice's felony convictions and petitioners' misrepresentations constituted "separate and independent grounds for disqualification." *Id.* at 59a; see Pet. 2 n.1. This is too little and too late. As discussed above, the court of appeals correctly concluded that the FCC decision rested on separate and independent grounds and petitioners conceded this point in the court of appeals. Because petitioners do not challenge the "separate and independent" ground that their misrepresentations warranted revocation, any review of the other ground for revocation would not affect the remedy in this case.

2. In any event, the revocation based on Rice's felony convictions does not implicate the Excessive Fines Clause of the Eighth Amendment.[2] "The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" *Austin* v. *United States*, 509 U.S. 602, 609-610 (1993) (quoting *Browning-*

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[2] It is unclear whether the Eighth Amendment's prohibition on excessive fines protects corporations, such as petitioners, as well as individuals. See *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989).

Ferris Indus. of Vt., Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)) (emphasis by the Court). An action that serves solely a remedial purpose does not implicate the Excessive Fines Clause. 509 U.S. at 610. Thus, even if we assume that forfeiture of an FCC license is a "payment,"[3] the court of appeals correctly held that the FCC's revocation did not implicate the Excessive Fines Clause because it served only remedial purposes.

The court of appeals found reasonable the FCC's conclusion that Rice's felony convictions indicated that petitioners did not possess the character necessary to ensure that the licenses and permits would serve the public interest. Pet. App. 4a-14a. Petitioners do not challenge that conclusion before this Court.[4] The obvious remedy for a finding that a licensee does not possess the qualifications necessary to hold a license is to revoke the license. Congress provided that remedy

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[3] Given this Court's holdings that the granting of an FCC license does not confer a property interest, see *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 394 (1969) ("Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them."); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."), it is difficult to see how revocation of a license could be considered a "payment" to the government.

[4] Some of the language in the petition continues to criticize the FCC policy of considering non-FCC-related misconduct to determine character. The petitioners do not, however, ask this Court to review the court of appeals' rejection of petitioners' challenge to the agency's character policy as arbitrary and capricious. Thus, as this case comes to the Court, it must be assumed that the FCC properly determined that petitioners do not possess the character required of licensees.

in 47 U.S.C. 312(a)(2) and the FCC exercised it in this case. As the FCC explained, revocation is an appropriate remedy when a "licensee or permittee has not met its statutory obligation to operate its facility in the public interest." Pet. App. 61a.

Contrary to petitioners' assertion (Pet. 3), this Court's Excessive Fines Clause decisions support the view that the FCC action in this case is not punitive. In *Austin* v. *United States*, *supra*, this Court considered its previous decisions in determining whether a historical "understanding of forfeiture as punishment" existed. *Id.* at 615. As a prior decision of this Court makes clear, the historical understanding is that FCC disqualification determinations are not punitive. In *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946), a radio station argued that the FCC's decision not to renew its license, because of misrepresentations the station made in its FCC filings, "inflict[ed] a penalty." *Id.* at 228. This Court disagreed, holding that a "denial of an application for a license because of the insufficiency or deliberate falsity of the information lawfully required to be furnished is not a penal measure."[5] *Ibid.* While an

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[5] Petitioners attempt to distinguish *WOKO* because it involved a misrepresentation to the agency, as opposed to a conclusion based on non-FCC-related misconduct that a licensee or permittee did not have the requisite character. As discussed in footnote 4, *supra*, however, petitioners do not challenge the reasonableness of the FCC's conclusion that petitioners no longer satisfied the statutory requirement of furthering the public interest. Given this finding, which the court of appeals affirmed, there is no pertinent distinction between a revocation based on misrepresentation and one based on a finding that a licensee or permittee is not furthering the public interest. Pet. App. 61a. In either case, the FCC is remedying the fact that a licensee or permitee no longer meets the statutory requirements for holding a license or permit.

adverse licensing decision "may hurt and it may cause loss," that alone does not make an action punitive. *Ibid.*; see also *United States* v. *Halper*, 490 U.S. 435, 447 n.7 (1989) (explaining that courts should not determine whether a sanction is punishment from the perspective of the affected party because from that perspective "even remedial sanctions carry the sting of punishment"). In this case, petitioners base their contention that the FCC order is a "penalty" on nothing more than an assertion that the disqualification will "hurt" and will "cause loss" to Mr. Rice. That was not sufficient to make the FCC action in *WOKO* a penalty, and it is not sufficient to make the FCC action in this case a penalty.[6]

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[6] Petitioners contend that the court of appeals' decision in this case conflicts with its earlier decision in *Wilkett* v. *ICC*, 710 F.2d 861 (D.C. Cir. 1983). Pet. 17-18. But *Wilkett* did not involve an Excessive Fines Clause issue; the court of appeals vacated the ICC decision because it was arbitrary and capricious. The court of appeals in this case adequately distinguished *Wilkett* with respect to petitioners' arbitrary and capricious challenge (Pet. App. 9a), a challenge that is not renewed in the petition for certiorari. In any event, any inconsistency in intracircuit decisions would be a matter for the court of appeals, rather than this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for writ of certiorari should be denied.
Respectfully submitted.

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